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In The Supreme Court of the United States

MICHAEL HAMILTON and NICOLA MESSERE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether defendant Hamilton's indictment was unconstitutionally broadened by a variance of proof resulting in a violation of his right to Due Process?

2. Whether the district court erred in its finding that defendant Hamilton was liable for 9.5 grams of cocaine base, when he had no idea that a transaction was in place or of the quantity of drugs involved therein?

3. Whether prejudicial spillover of otherwise inadmissible evidence requires reversal of defendants' convictions?

4. Whether retroactive prejudicial misjoinder requires reversal of defendants Hamilton and Messere's convictions?

5. Whether the Court should resolve the split among the Circuits regarding the foundational requirements for tape recordings?

PARTIES IN THE COURT BELOW

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Michael Hamilton and Nicola Messere petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the Second Circuit Court of Appeals is reported at 334 F.3d 170 (2nd Cir. 2003).

JURISDICTION

The Second Circuit filed its decision on July 2, 2003. This court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Fifth Amendment

[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

21 U.S.C. § 841(a)(1)

Unlawful Acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute or dispense a controlled substance.

21 U.S.C. § 856

It shall be unlawful to, (1) knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance.

21 U.S.C. § 856(a)(1)

Maintaining a place for the purpose of distributing or using cocaine base, crack, a Schedule II controlled substance.

21 U.S.C. § 843(b)

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under the narcotics laws.

18 U.S.S.G. § 2D1.8

Renting or Managing a Drug Establishment: Attempt or Conspiracy, which provides, in pertinent part:

(a) Base Offense Level: (1) The offense level from § 2D1.1 applicable to the underlying controlled substance offense, except as provided below.

(2) If the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises, the offense level shall be 4 levels less than the offense level from § 2D1.1 applicable to the underlying controlled substance offense, but not greater than level 16.

STATEMENT OF THE CASE

A. Introduction

The charges against defendant Michael Hamilton ("Hamilton") and Nicola Messere ("Messere"), both officers of the Schenectady Police Department ("SPD"), involved accusations that several SPD officers provided crack cocaine dealers and addicts with drugs, immunity, and protection in exchange for information about other drug dealers. Hamilton served as a Police Officer in the SPD from 1989 to 1996, Messere began his career as a patrol officer in 1986. Hamilton was promoted to Sergeant in the SPD on February 16, 1996, and on December 20, 1998, Hamilton was promoted to the rank of Lieutenant within the Patrol Division of the SPD.

On September 18, 2001, Hamilton and co-defendant Nicola Messere ("Messere") were arraigned on a superseding indictment, charging them in Count One with violating the Racketeer Influenced and Corrupt Organizations ("RICO") Act, in violation of 18 U.S.C. § 1962, through committing various acts of street-level drug distribution, aiding and abetting the maintenance of a crack house, and tampering with witnesses while employed by the SPD, the alleged criminal "enterprise."

Hamilton was also charged with three substantive counts. Count Three charged Hamilton with having intentionally aided and abetted the maintenance of a crackhouse, as charged as RICO violation number 9 in Count One. Count Four alleged that Hamilton engaged in witness tampering, as charged as RICO violations numbers 10 and 11 in Count One. And, Count Five charged Hamilton with using his telephone in connection with his aiding and abetting the maintenance of the crack house

referenced above. Co-defendant Nicola Messere was charged with Hamilton in Count One, as well as alone in Count Two, which alleged that Messere knowingly possessed with intent to distribute cocaine base.

On January 16, 2002, following five weeks of testimony from drug addicts, prostitutes, a pimp, and cooperating witnesses, Hamilton was acquitted of the RICO violation charged in Count One and the witness tampering charged in Count Four. He was, however, convicted on Count Three, Aiding and Abetting the Maintenance of a Residence for the Purpose of Distributing and Using Cocaine Base, in violation of 21 U.S.C. §§ 856(a)(1) and (b), and on Count Five, Using a Communication Device to Commit a Felony, in violation of 21 U.S.C. §§ 843(b) and (d)(1). His co-defendant, Messere, was also acquitted of the RICO charge, but was convicted on Count Two, possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1).

B. The Trial

With respect to his convictions on Count Three, Aiding and Abetting the Maintenance of a Residence for the Purpose of Distributing and Using Cocaine Base, and Count Five, Using a Communication Device to Commit a Felony, the government tried Hamilton on the theory that on March 8, 2000, he attempted, through his informant Darla Wharry ("Wharry"), to tip off the occupants of a crack house as to his belief that their location was under police surveillance. The evidence at trial demonstrated that before Hamilton met with Wharry to retrieve a wallet from her, a deal for what turned out to be 9.5 grams of cocaine base *had already completed* in the crack house.

The undisputed evidence showed that on March 8, 2000, Hamilton called Wharry from his cellular phone to arrange meeting her for the sole purpose of retrieving the wallet referenced above. When Hamilton arrived at Wharry's location at 1:53 p.m., and noticed that police surveillance were in the vicinity, he drove past the location. After he met Wharry several blocks away at 2:07 p.m., Hamilton then attempted to prevent her from returning to the location. She falsely assured him that no deal was going down. Hamilton, who knew Wharry only to be an addict who sold, at most, personal use quantities of crack cocaine, had no idea that a deal of any sort was transpiring. Despite Wharry's assurances and Hamilton's reliance upon them, a drug transaction involving 9.5 grams of crack cocaine ("underlying transaction") had, in fact, already concluded within the residence at 1:59 p.m. – eight minutes before Hamilton even met Wharry.

Notably, Hamilton did not participate in the underlying transaction, and he had absolutely no way of foreseeing that it would involve 9.5 grams of cocaine base – the equivalent of 950 grams of cocaine under the Guidelines. The location in question was known only to have sold personal use quantities of crack cocaine.

C. Prejudicial Spillover and Retroactive Misjoinder

At trial, the government unsuccessfully attempted to prove that both Hamilton and Messere, as members of the SPD, were part of a racketeering enterprise. The trial court admitted uncharged acts going back ten years and joinder of the defendants, ostensibly justified by charges of joint conduct of which they were both acquitted, permitted voluminous testimony and acts which related to only one defendant. For example the counts for which each

defendant was convicted were unique to each defendant and the government's arguments and proof reflected this. Less than one day of evidence during a five-week trial formed the basis of Messere's conviction. Less than nine pages of direct testimony out of a trial transcript of 3,939 pages pertained to Mr. Messere's count of conviction. The government alleged they furthered the enterprise by means of (1) distributing drugs to users in exchange for information about criminal activities and (2) tampering with witnesses after the investigation commenced. The government presented in support of the governments RICO claim, numerous drug-addicted cooperating witnesses. In fact, to buttress its case against Messere, the government called nearly ten witnesses whose testimony would have been wholly inadmissible in a trial against Hamilton alone.

Notably, the only alleged acts that served to justify joinder of Hamilton and Messere for trial – an allegation of joint drug distribution to Seba Richards ("Richards") and tampering with government witness Michael Siler ("Siler") in connection with the instant investigation, as set forth as Racketeering violations 8 and 12 – proved to have no merit whatsoever.

REASONS FOR GRANTING THE PETITION

I. MICHAEL HAMILTON'S INDICTMENT WAS UNCONSTITUTIONALLY BROADENED BY A VARIANCE OF PROOF RESULTING IN A VIOLATION OF HIS DUE PROCESS RIGHTS

It is well settled that an offense proved at trial, not contained within the underlying grand jury indictment, unconstitutionally broadens that indictment and is a

violation of Due Process. *See United States v. Miller*, 471 U.S. 130, 139 (1985). Hamilton's convictions on Counts Three and Five were subject to that fatal error.

The Second Circuit in this matter upheld Hamilton's convictions based upon the finding that the maintenance of the crack house, referenced in the statement of the case, was ongoing between late 1999 and March 8, 2000. Appendix (hereinafter "App.") at 19. Yet, Hamilton's indictment, with respect to Title 21 U.S.C. § 856, the statute underlying his convictions on Counts Three and Five, noticed him and charged him *only* as to conduct occurring on March 8, 2000. Similarly, that date was the only one provided in the indictment and Court's instruction to the jury – as agreed to by the parties – concerning the elements of 21 U.S.C. § 856. Based on the foregoing, the findings of the district court and the Second Circuit – premised on conduct predating March 8, 2000, as far back as late 1999 – denied Hamilton his Due Process right to fair notice of the criminal allegations against him.

This Court, in the seminal case of *Bollenbach v. United States*, 326 U.S. 607 (1946), expressly denounced that precise constitutional violation. Indeed, in *Bollenbach*, the Second Circuit affirmed a defendant's conviction of conspiring to and knowingly transporting stolen securities in interstate commerce despite a "mistake in the charge" because it assumed that he could be convicted under the indictment, in any event, as an accessory after the fact. 326 U.S. at 610. As this Court aptly noted, however, the defendant "was neither charged nor tried nor convicted as an accessory after the fact." *Id.* In reversing the Second Circuit, this Court held that:

> In view of the government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from

> the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> 326 U.S. at 614.

This Court went on to explain:

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.
>
> 326 U.S. at 614.

In the instant case, the Second Circuit agreed with Hamilton that his conviction for aiding and abetting the maintenance of a crack house could not stand where the substantive crime had already been committed. However, in direct contravention of *Bollenbach*, *supra*, the Second Circuit ignored the fact that Hamilton was charged with aiding and abetting the maintenance of a crack house on one day, and one day only, and summarily found his aiding and abetting the maintenance of a crack house to have been an ongoing offense. App. at 19.

As in *Bollenbach*, the Second Circuit based Hamilton's conviction on a crime that had already been completed prior to his alleged involvement therein. 326 U.S. 607, 610 (1946). Indeed, the Second Circuit wrongly found that whether or not the underlying transaction conducted on

March 8, 2000 – the only date charged within Counts Three and Five of the indictment – was completed when Hamilton spoke to Wharry was immaterial. App. at 19.

Despite the Second Circuit's holding, Count Three of Hamilton's indictment clearly stated:

> On or about March 8, 2000, in the Northern District of New York, the defendant **MICHAEL HAMILTON**, knowingly and intentionally did aid, abet, counsel, and willfully cause the maintenance of a place at 1213 First Avenue, 3rd Floor, Apt. #5, Schenectady, New York, for the purpose of distributing and using cocaine base (crack), a Schedule II Controlled Substance, in violation of Title 21 United States Code, Section 856 and Title 18 United States Code, Section 2.

Plainly, the indictment notified Hamilton that the only day in issue was March 8, 2000. Yet, both the Second Circuit and the district court relied upon other dates in upholding his conviction. The Second Circuit noted that there was "more than sufficient evidence that 1213 First Avenue was being maintained from late 1999 through March 8, 2000 as a crack house." App. at 19. Because the Fifth Amendment guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," United States Constitution Amendment V, a variance between the pleading and the proof destroys that substantive right of the defendant and cannot be viewed as a harmless error. *See Stirone v. United States*, 361 U.S. 212, 217 (1960).

Here, the indictment on Count Three and the charge stemming from it, Count Five, make no mention of any time other than March 8, 2000. Certainly, those counts

cannot fairly be construed to give notice as to events over a period of six months earlier.

Equally important, neither the Second Circuit nor the district court attributed to Hamilton criminal liability for any specific drug transaction apart from the one on March 8, 2000. And, significantly, that drug transaction – the only one for which discovery had been provided – was completed eight minutes before Hamilton arrived on the scene.

Even if a criminal enterprise has been formed, the liability of one who joins in it later is "limited to the common purpose while he remains in it." *See United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938). The government's entire case rested on the premise that because Hamilton allegedly warned Wharry that the Task Force was in the area, he aided and abetted the maintenance of a crack house. Yet, Hamilton did not even meet Wharry until 2:07 p.m., and thus could not have joined the venture until that point. In fact, there is not one shred of evidence that Hamilton was aware of the Task Force surveillance until he stumbled upon it, let alone that the underlying drug transaction had been planned or had taken place.

The law makes plain that one cannot be held responsible for a crime that has been completed prior to his involvement therein. *See United States v. Freeman*, 498 F.2d 569 (2d Cir. 1974). Thus, the indictment must be read to give Hamilton notice as to only those events which took place after the underlying drug transaction had completed. Even were it true that Hamilton inadvertently warned Wharry of the surveillance of the crack house when he became aware of its presence, thereby indirectly aiding and abetting its maintenance, he had nevertheless joined

the criminal enterprise after the underlying drug transaction had ended. Consequently, his liability must be appropriately limited.

In addition, the district court gave no limiting instruction to the jury as to how the evidence should be reviewed. In *United States v. O'Connor*, evidence of transactions other than those charged were admitted at trial. 737 F.2d 814, 821-22 (9th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985). However, the court in *O'Conner*, *id.*, nevertheless linked the charge to the violations alleged in the indictment so as to permissibly amend that indictment. In the instant case, the district court, though permitting the introduction of evidence from times and dates not stated within Counts Three and Five of the indictment, gave no such instruction. Indeed, the district court's charge with respect to Count Three follows:

> Count Three of the Indictment and Racketeering Act 9 charge Michael Hamilton with aiding and abetting the operation of a "crack house" on March 8, 2000.

Title 21, United States Code, Section 856 provides that:

> It shall be unlawful to . . . (1) knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance.
>
> You should note that defendant Hamilton is not charged with operating a crack house himself. Instead, he is charged with aiding and abetting the operation of a crack house by another person. The guilt of a defendant in a criminal case may be established without proof that he personally did every act constituting the offense

> alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by acting in concert with another person or persons in joint effort or enterprise.

Title 18, United States Code, Section 2, the aiding and abetting statute provides in pertinent part:

> Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission is punishable as a principal.
>
> To find an individual guilty of aiding and abetting the operation of a "crack house" in violation of 21 U.S.C. § 856, you must find that:
>
> 1. An individual knowingly opened or maintained a location for the purpose of distributing or using a controlled substance, in this case, crack cocaine; and
>
> 2. A voluntary act, or inaction, by the defendant with the specific intent that his act bring about the underlying crime.

To prove the defendant's guilt as an aider and abettor, the evidence must demonstrate that the defendant joined the venture, shared in it, and his efforts contributed towards its success. Plainly, this charge makes no attempt to limit the jury's use of the evidence in determining Hamilton's conviction. Based on the foregoing, the Second Circuit bypassed established Constitutional precedents of this Court, thereby convicting Hamilton of an offense with which he was not charged. Accordingly, as in *Stirone*, 316 U.S. at 217, this indictment has been unconstitutionally broadened, and Hamilton's conviction on Counts Three and Five must be reversed.

II. THE DISTRICT COURT ERRED IN ITS FINDING THAT DEFENDANT WAS LIABLE FOR 9.5 GRAMS OF COCAINE BASE, WHEN HE HAD NO IDEA THAT A TRANSACTION WAS IN PLACE OR OF THE QUANTITY OF DRUGS INVOLVED THEREIN

Incorrectly attributing to Hamilton the entire weight of the cocaine base involved in the March 8, 2000, underlying transaction – 9.5 grams – the district court, relying upon 18 U.S.S.G. § 2D1.8(a)(1), employed a base offense level of 26 in its Guideline calculation. That analysis, however, was in error, as Hamilton neither directly participated in the March 8, 2000, underlying transaction nor reasonably foresaw the weight of the drugs involved therein.

In *United States v. Chalarca*, 95 F.3d 239 (2d Cir. 1996), the Second Circuit upheld the district court's finding that a base offense level of 12, the lowest drug offense level applicable to a Schedule II substance such as cocaine under 18 U.S.S.G. § 2D1.1, applied, notwithstanding the defendant's conviction after a jury trial for conspiracy to possess in excess of five kilograms of cocaine, in violation of 21 U.S.C. § 841(b)(1)(A), because the defendant did not jointly undertake or reasonably foresee involvement with any specific quantity of drugs. *See also United States v. Velasquez*, 67 F.3d 650, 654 (7th Cir. 1995) (holding that relevant inquiry into foreseeability is based on whether defendant was a direct participant in underlying transaction.); *United States v. Corral-Ibarra*, 25 F.3d 430, 438 (7th Cir. 1994) ("critical distinction is between direct and remote involvement in illegal activity because only the later will trigger a reasonable foreseeability analysis"); *and, United States v. McCullah*, 76 F.3d 1087, 1105-06

(10th Cir. 1996) (directly participating in drug recovery scheme results in responsibility for entire quantity of drugs and no reasonable foreseeability analysis).

In the instant case, Hamilton was not directly involved with any quantity of drugs, nor was any quantity reasonably foreseeable to him. Indeed, as set forth above, the deal at issue had been completed prior to Hamilton's and Wharry's meeting. Hamilton's limited conduct on March 8, 2000, served in the jury's eyes to abet maintenance of Wharry's drug apartment, without it ever having considered the issue of drug quantity.

The Guideline applicable to Hamilton's conviction for aiding and abetting a crack house is 18 U.S.S.G. § 2D1.8, Renting or Managing a Drug Establishment: Attempt or Conspiracy, which provides, in pertinent part:

> (a) Base Offense Level:
>
> > (1) The offense level from § 2D1.1 applicable to the underlying controlled substance offense, except as provided below.
> >
> > (2) If the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises, the offense level shall be 4 levels less than the offense level from § 2D1.1 applicable to the underlying controlled substance offense, but not greater than level 16.

Thus, for a defendant who only aided and abetted an individual who had no participation in the underlying controlled substance violation other than allowing use of the premises – such as Wharry – subsection (a)(2) applies. The remaining query then is what offense level applies under 18 U.S.S.G. § 2D1.1.

As referenced above, the Second Circuit in *Chalarca, supra*, affirmed the sentencing court's proper application of the lowest offense level applicable to cocaine, notwithstanding that (1) the defendant was arrested in a jeep containing $70,000.00 while receiving what his co-defendant believed to be a kilogram of cocaine, and (2) the government sought to hold the defendant liable for 12 kilograms of cocaine. At sentencing, the district court looked to the Guidelines as they applied to "jointly undertaken criminal activity," per 18 U.S.S.G. § 1B1.3, and found that the defendant could foresee neither the 12 kilograms of cocaine at issue nor the amount of cocaine that could be purchased with $70,000.00. The district court's findings in *Chalarca*, 95 F.3d 239, 242, can almost perfectly be applied to Hamilton:

> Assuming as I must that [Hamilton aided and abetted maintenance of a crack house as to a drug deal already completed] there is simply no credible evidence that he was aware of or participated in any discussions regarding the amount. There is no evidence that [Hamilton] discussed the quantity of drugs with [the occupants of the location] or the CI . . . There is no evidence that [Hamilton] ever saw any drugs or had anything to do with raising the money to purchase the drugs. While he did see [Wharry shortly after the approximate time of this deal], this does not mean that he knew what drug or quantity of drugs . . . would be . . . purchased.

Wharry testified that she had told Hamilton there were no drugs in the house and denied being involved in any illegal conduct. It was therefore error for the district court to have ascribed to Hamilton the weight of an

unforeseeable, already completed deal that was not jointly undertaken.

Based on the foregoing, Hamilton's sentence must be vacated and this matter remanded for re-sentencing.

III. PREJUDICIAL JOINDER AND SPILLOVER OF OTHERWISE INADMISSIBLE EVIDENCE REQUIRES REVERSAL OF HAMILTON AND MESSERE'S CONVICTIONS

This court has never defined when the cumulative adverse effect of unproven or acquitted charges prejudices or taints a conviction. This case represents a dramatic example of the effects to two defendants of uncharged or unproven conduct relating only to a co-defendant admitted in the name of a racketeering charge dismissed by the jury. Less than nine pages of direct testimony out of a trial transcript of 3939 pages pertained to Mr. Messere's count of conviction. The term "prejudicial spillover" does not have a uniform definition. The Fifth Circuit recently defined it as an analytical tool of whether the trial court properly denied a motion for severance. *See United States v. Edwards,* 303 F.3d 606, 639 (5th Cir. 2002). The Seventh Circuit basically fails to recognize the concept, finding no prejudice to a defendant from acquitted or dismissed counts provided the crime for which the defendant was convicted was properly joined to the crime for which the defendant was acquitted. *See United States v. Holzer,* 840 F.2d 1343, 1349 (7th Cir. 1988). The Second Circuit recognizes the concept, but differentiates between acquitted and judicially dismissed counts as set forth hereinbelow. When a defendant is subjected to the "spillover" of evidence offered in support of counts which either relate to a co-defendant or are dismissed due to an acquittal, a new trial

is warranted in order to purge the taint of the jury's conviction on the remaining counts. Thus, in *United States v. Baine*, 139 F.3d 603 (8th Cir. 1998), the trial court's granting of a new trial, pursuant to Federal Rule of Criminal Procedure 33, was upheld where the jury's consideration of dismissed and extraneous evidence resulted in a "spillover" effect, tainting its consideration of the defendant's count of conviction. The Second Circuit in this case finds no "taint" when the extraneous evidence, regardless of its volume, is "dismissed" by the jury.

The Second Circuit concluded that prejudicial spillover did not occur in this case "because the jury found the government's proof on other counts unpersuasive." App. at 27. The Second Circuit rationale that only an appellate or trial court's finding of insufficient proof of charges can trigger a finding of prejudicial spillover is neither logical nor consistent. It automatically precludes any appellate analysis of improperly charged conduct for which a jury acquits. In evaluating claims of prejudicial spillover of evidence related to invalidated counts, the Second Circuit has identified four factors for determining whether the circumstances require reversal of the remaining counts: (1) whether the evidence on the invalidated count would have tended to incite or arouse the jury into convicting the defendant on the remaining counts; (2) whether the reversed and remaining counts arose out of similar facts so that the evidence introduced would have been admissible as to both; (3) whether the evidence on the reversed and remaining counts was completely dissimilar, thus permitting the inference that the jurors were able to keep the evidence separate in their minds; and (4) whether the strength of the government's case on the remaining counts

could withstand the potential spillover prejudice. *See United States v. Rooney,* 37 F.3d 847, 855-56 (2d Cir. 1994).

Consideration of these factors and the effect of unproven or acquitted charges should not be limited to cases in which counts are reversed on appeal, but should also extend to circumstances in which prejudicial spillover of evidence from the *acquitted* counts has the cumulative adverse effect of evidence of unproven charges. There is no theoretical or logical reason for such a distinction. Indeed, as noted over thirty years ago by the Second Circuit, "[o]ne of the hazards of a RICO count is that when the government is unable to sustain a conviction under this statute, it will have to face the claim that the prejudicial effect of tarring a defendant with the label of "racketeer" tainted the conviction on an otherwise valid count." *United States v. Giuliano*, 644 F.2d 85 (2d Cir. 1981). If labeling a defendant a "racketeer" may taint a conviction, what of the effect of the acquitted conduct of not only the defendant, but co-defendant also?

Each of the factors enumerated above militates strongly in favor of reversal and remand for a new trial for both Hamilton and Messere. With respect to the first factor – whether evidence admitted on the invalidated count would have tended to incite or arouse the jury into convicting the defendant on the remaining counts – Hamilton and Messere endured an avalanche of irrelevant RICO evidence at trial. There is a substantial likelihood that the quantity of evidence the jury heard in support of the acquitted racketeering charge and against Hamilton's co-defendant, Messere, incited the jury into convicting Hamilton on Counts Three and Five. Messere's jury heard charges of witness tampering involving Hamilton which were rejected by the jury and in no way similar to or

connected to Messere or the theory of Messere's prosecution. Hamilton and Messere's acquittal of the RICO charges is significant since the majority of the trial involved evidence the government was allowed to introduce to establish the criminal enterprise.

The Second Circuit justified the introduction of ten-year old and other uncharged, unnoticed and acquitted conduct under Rule 404(b). However the trial court never conducted a 404 analysis to assess prejudicial versus probative value among other balancing factors and the prosecution specifically sought to portray its other act evidence as not encompassed by Rule 404(b) to justify its non-compliance with the strictures of Rule 404(b), including its failure to give proper notice of these acts. The Second Circuit's approach of overlooking acquitted conduct in racketeering cases and then justifying its reasoning because "*much*", (App. at 28) but not all, of the acquitted or uncharged evidence is admissible under Rule 404(b) is belied in a case such as this when the government bypassed Rule 404(b) notice and "balancing" requirements by arguing at trial that the uncharged conduct was background of the Racketeering count and outside the scope of 404(b). (There was no conspiracy charge justifying receipt of the evidence.) The Second Circuit's decision allows the government to bypass Rule 404 notice and balancing requirements and use Rule 404(b) as an appellate theory of convenience.

IV. RETROACTIVE PREJUDICIAL MISJOINDER REQUIRES REVERSAL

This Court has also never defined when prejudicial misjoinder warrants reversal of a defendant's conviction, i.e. where "joinder of multiple counts [and defendants] was proper initially, but later developments – such as a district

court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions – render the initial joinder improper." *United States v. Jones*, 16 F.3d 487 (2d Cir. 1994). *See also United States v. Bellomo*, 176 F.3d 580 (2d Cir. 1999) (reversing conviction due to retroactive misjoinder and insufficient proof of predicate racketeering act).

Acknowledging that severance or bifurcation *pre-trial* was not proper in light of the government's charging Hamilton and Messere with two RICO acts alleged to have been committed jointly, the government's failure to obtain a RICO conviction resulted in *retroactive* misjoinder. The jury heard evidence relating to both defendants' alleged involvement in crimes, which the Indictment charged were committed over a ten-year period,[1] involving giving drugs to informants in exchange for information and witness tampering. Having acquitted the defendants of the RICO charge, remand for an individual trial on the remaining substantive counts is required as, in retrospect, the jury never should have heard evidence on the RICO count or evidence pertaining to each co-defendant's independent and unrelated alleged criminal conduct.

It would be patently unfair to allow Hamilton's convictions for aiding and abetting maintenance of a crack house and his using a phone to do so to stand where the government failed entirely to prove any of the facts that had warranted joinder pre-trial. Given the sheer volume of

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[1] Despite the Indictment alleging conduct from 1990 forward, the earliest act charged against Hamilton was alleged to have occurred sometime between 1996 and 2000.

inflammatory evidence offered in the name of racketeering, involving acts over a decade-long period, there is a reasonable probability that the jury was swayed to convict Hamilton and Messere of the other charges even though the evidence at trial did not support those counts.

Messere was also prejudiced by the improper joinder by the government's presentation of a witness on the eve of a defense case of a witness ostensibly to testify to the co-defendant's drug distribution. This witness was the brother-in-law of one of the chief investigators, an antagonist of the co-defendant Hamilton. This witness was poised to raise the matter of the suicide of a fellow officer at the police station who was involved in the investigation. All parties agreed prior to trial that this topic was too inflammatory and too collateral to be injected into the trial. However this witness was to include the suicide in his testimony as an explanation for why he decided to come forward. This witness had nothing to do with the defendant Messere. The district court precluded this witness because it found prejudice to the defendant Messere, *including denying him the opportunity to move for a severance in advance of trial* since the government's witness raised the highly inflammatory suicide of another officer. The trial court found this issue had a prejudicial effect upon Messere's trial strategy including "the openings, cross-examinations and trial testimony". Despite its finding of prejudice to the defendant Messere in the government's last minute witness, the trial court ruled that the witness could testify in rebuttal if either defendant "opened the door" to his testimony. Both defendants had many of the same witnesses. Given the proof and joinder of the defendants, Messere was now at the beginning of his defense and limited in his ability to call witnesses on his behalf and even testify on his own behalf. Some witnesses, such

as DEA agents who had worked with the defendants during the alleged dates of the racketeering would likely open the door since their testimony involved the good work, procedures and character of both defendants. It is impossible to separate the DEA agents' testimony (and that of other witnesses) involving the two defendants anymore than it is possible to separate milk from coffee since their activities and work were so intertwined. This was another consequence of the retroactive misjoinder which developed only during the trial. The Second Circuit did not address the district court's finding of prejudice to the defendant Messere because of his joinder with the co-defendant and its effect upon the defendant's ability to present a defense.

Apart from the issue of the government's last minute witness and his effect upon the defendant Messere, both defendants suffered as a result of evidence produced which would never have been admissible absent the prejudicial misjoinder.

V. THE COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS REGARDING THE FOUNDATIONAL REQUIREMENTS FOR TAPE RECORDINGS

The Second Circuit explicitly rejected the collective wisdom of the Third Circuit in *United States v. Starks*, 515 F.2d 112 (3rd Cir. 1975) and the Eighth Circuit in *United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974) establishing foundational requirements for the admission of audio recordings including "[t]hat the conversation elicited was made voluntarily and in good faith, without any kind of inducement". *Starks*, 515 F.2d at 121 n.11; *McMillan*, 508 F.2d at 104. It is this requirement that the Second Circuit

sidestepped in a case of two significant tape recordings replete with bad faith, including the supplying of drugs to the declarants by the government's informant which also provided rich inducement to make statements responsive to the incessant and suggestive questioning of the informant. Because of this divergence between the Circuits, tape recordings, a widespread form of evidence, is subject to wildly different requirements for admission into evidence. Thus a tape recording introduced into evidence in New York does not require that the conversation be made voluntarily, in good faith and without any kind of inducement whereas as a tape recording introduced in Philadelphia does.

The Second Circuit upheld the admission into evidence of two tape recordings – the first created on March 8, 2000, with crack addict Darla Wharry and the second created on April 11, 2000, with crack addict Seba Richards – made by the non-testifying government informant "Supreme". These tapes were the foundation of the government's case. During trial it was disclosed for the first time that these witnesses were under the influence of crack cocaine at the time of their statements, with the free cocaine supplied by the government's informant "Supreme" who was party to these tape-recorded conversations. Co-defendant Hamilton's brother James Hamilton arrested "Supreme" as part of a joint federal, state, and local task force on drug charges, for which "Supreme" received and served a five-year prison sentence. These tapes were part of the prejudicial spillover referred to in issue three hereinabove. The March 8, 2000, tape, for example, concerned drug activities to which the defendant Messere was never connected. The April 11, 2000, tape contained crack induced statements which would only be admissible against one defendant. Nor was the March 8, 2000, transaction involving the crime of aiding and

abetting the maintenance of a crack house connected to Messere's charges, the tapes and prosecutor's presentation did not make this clear.

The defendants objected to the admission of these tapes on the ground that the tape-recorded statements lacked reliability and accuracy given that they were the product of rambling, crack-intoxicated individuals intentionally placed in that state by a government informant who did not testify. Richards admitted that while "Supreme" fed her free cocaine he pressured her to implicate Hamilton and Messere. The government even produced testimony that "Supreme" was prepared to lie to get Hamilton and Messere off the police force. The tape was admitted without any finding of reliability over the defendants' objections.

Moreover, the Second Circuit held that the reliability and credibility of the statements made on the recording went to evidence's weight rather than to its admissibility (even though the prosecution never produced "Supreme"). The Second Circuit's requirement for the admission of tape recordings permits the government to bypass traditional reliability requirements for the admission of hearsay testimony. This Court clearly holds that the reliability requirement for admission of hearsay statements requires either that the statement fall within a firmly-rooted exception is supported by "a showing of particularized guarantees of trustworthiness". *Idaho v. Wright*, 497 U.S. 805, 816 (1990), *citing Ohio v. Roberts*, 448 U.S. 56, 66 (1980) These two tapes have only guarantees of *un*trustworthiness. The Second Circuit's decision cannot be squared with this Court's decisions.

The Second Circuit's decision to skirt long established reliability requirements for all evidence in general and hearsay statements in particular when electronically recorded evidence is offered has significant ramifications given the frequency with which electronic evidence is offered into evidence. The trial court should properly have excluded these tape recordings on the grounds raised by the defense – namely that they were the product of rambling, crack-intoxicated individuals who had been intentionally placed into that state by a government informant seeking to obtain information for use by the government and lacked the necessary foundation. The recordings lacked clear and convincing indicia of reliability and accuracy, given the totality of the circumstances under which they were made. The tapes were the product of misconduct on the part of an informant who was not called as a witness at trial. These facts challenge the good-faith, voluntariness and lack of inducement criteria which the Third and Eighth Circuits utilize to insure the reliability of tape-recorded statements used as evidence.

The Court should affirm the collective wisdom of the Third and Eighth Circuits which require that tape-recorded conversations be made "voluntarily, and in good-faith, without evidence of inducement" and resolve their split with the Second Circuit.

CONCLUSION

This Court has not defined the concept and application of prejudicial spillover and retroactive misjoinder despite their use at the Circuit Court level. The Defendant Michael Hamilton's indictment was unconstitutionally

broadened and he was sentenced for an unforeseeable drug transaction. The conflict in Circuits regarding the foundational requirements for tape recordings, coupled with the Second Circuit's skirting of traditional reliability requirements, is a further reason the Court should grant the petition for a writ of certiorari and reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: May 20, 2003 Decided: Jul. 2, 2003)

Docket Nos. 02-1315(L), -1322

UNITED STATES OF AMERICA,

Appellee,

-v.-

MICHAEL HAMILTON and NICOLA MESSERE, also known as Supercop,

Defendants-Appellees.

Before: KEARSE, STRAUB, and RAGGI, *Circuit Judges.*

Appeals from judgments of the United States District Court for the Northern District of New York, David N. Hurd, *Judge*, convicting defendant Hamilton of aiding and abetting the maintenance of a residence for purposes of narcotics offenses, 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2, and of using a cellular telephone to facilitate such maintenance, 21 U.S.C. § 843(b), and convicting defendant Messere of distributing and possessing with intent to distribute narcotics, 21 U.S.C. § 841(a)(1).

Affirmed.

ELIZABETH S. RIKER, Assistant United States Attorney, Syracuse, New York (Glenn T. Suddaby, United States Attorney for the Northern District of New York, Gregory A. West, John

Katko, Assistant United States Attorneys, Syracuse, New York, on the brief), *for Appellee*.

JOSEPH TACOPINA, New York, New York (Joseph A. Bondy, New York, New York, on the brief), *for Defendant-Appellant Hamilton*.

PAUL DEROHANNESIAN II, Albany, New York, (DerOhannesian & DerOhannesian, Albany, New York, Joseph A. Bondy, New York, New York, on the brief), *for Defendant-Appellant Messere*.

KEARSE, *Circuit Judge*:

Defendants Michael Hamilton and Nicola Messere, former officers in the Schenectady, New York Police Department, appeal from judgments entered in the United States District Court for the Northern District of New York following a jury trial before David N. Hurd, *Judge*, convicting them of narcotics-related offenses. Hamilton was convicted on one count of aiding and abetting the maintenance of a residence for the purposes of distributing and using controlled substances, in violation of 21 U.S.C. §§ 856(a)(1) and (b) and 18 U.S.C. § 2, and one count of using a cellular telephone to facilitate such maintenance, in violation of 21 U.S.C. §§ 843(b) and (d)(1); he was sentenced principally to 54 months' imprisonment, to be followed by a three-year term of supervised release. Messere was convicted on one count of distributing and possessing with intent to distribute cocaine base (crack), in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); he was sentenced principally to 27 months' imprisonment, to be followed by a three-year term of supervised release. On appeal, defendants contend primarily that the evidence

was insufficient to support their convictions. Alternatively, they contend that the district court should have granted them a new trial on various grounds, including prejudicial spillover of evidence introduced in support of a count on which they were acquitted, alleged errors in the admission of evidence, and the government's alleged subornation of perjury and nondisclosure of exculpatory evidence. Hamilton also challenges his sentence. Finding no merit in any of defendants' contentions, we affirm.

I. BACKGROUND

The present prosecution arose out of a 1999 federal investigation of several Schenectady Police Department ("SPD") officers who were suspected of providing crack cocaine dealers and addicts with drugs, immunity, and protection in exchange for information about other drug dealers. Hamilton and Messere were named in a five-count superseding indictment (the "indictment") that charged both defendants with racketeering, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (Count One); charged Messere with distributing and possessing with intent to distribute crack on or about July 19, 1998, in violation of 21 U.S.C. § 841(a)(1) (Count Two); and charged that Hamilton, on or about March 8, 2000, aided and abetted the maintenance of a residence for purposes of using and distributing crack, in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2 (Count Three), attempted to intimidate a witness with intent to obstruct a United States Drug Enforcement Administration ("DEA") investigation, in violation of 18 U.S.C. § 1512(b)(3) (Count Four), and used a cellular telephone to facilitate maintenance of a crack house, in violation of 21 U.S.C. § 843(b) (Count Five).

The jury ultimately returned verdicts of guilty only on Counts Two, Three, and Five. The government's principal trial witnesses with respect to those counts included SPD Officer Thomas Gabriele; former SPD Officer Michael Siler; and Darla Wharry, a crack user who had pleaded guilty to operating a crack house. The government also introduced a tape recording of certain conversations to which Wharry was a party and records of telephone calls made to Wharry's residence from Hamilton's cell phone. Taken in the light most favorable to the government, the evidence pertinent to the counts on which defendants were convicted showed the following.

A. Messere's Distribution of Crack on July 19, 1998

The government's principal witness on the charge that Messere had distributed and possessed crack with intent to distribute was Siler. Siler was an SPD officer who had been suspended in 1999 as a result of the federal investigation and had been dismissed in 2001 after he pleaded guilty to violating RICO by conducting the affairs of SPD through a pattern of racketeering activity. That activity included identifying drug dealers who had narcotics in their possession, taking the narcotics without arresting the dealers, and giving the drugs to various informants rather than reporting or delivering the contraband to SPD.

During his tenure in SPD, Siler had participated in seizures of substances that he believed to be crack cocaine, and laboratory tests had proved him correct. Based on that experience, Siler was able to recognize crack by its appearance. He was also familiar with the manner in which crack was packaged for sale to users.

Siler testified that at noon on July 19, 1998, he began a four-hour patrol shift, partnered with Messere. During that shift, at the intersection of State Street and Swan Street, Siler and Messere saw one of Messere's informants, Tina Martinez, who was a prostitute and crack addict. Siler testified that Messere motioned Martinez toward the car and said something Siler could not hear. When Martinez walked toward the car, Messere "threw some bumps out the window, some pieces of crack cocaine that he had and drove off." (Trial Transcript ("Tr.") 3325.) "[B]umps" were "small pieces of an off-white rock-type substance [that] appeared to be crack cocaine," packaged "in small baggie corners, tied off," in the manner in which, in Siler's experience, crack was sold. (*Id.*)

The government also called Martinez as a witness. She testified in part as follows:

> Q. Do you recall sitting on State Street one day and seeing Officer Messere?
>
> A. It was in the summertime. . . . I was sitting on the steps and Nick came up on the sidewalk in the police car. He came out of nowheres, and he would drive up and ask me who got it good. You know, where is the good crack at, and I told him I don't know. I don't know, you know, and he threw me a bump and told me to get off the streets, and he just drove away. . . .
>
> . . . .
>
> Q. You say he threw something out the window, would you describe what he threw out the window?
>
> A. A bump. A bag of crack, you know.

Q. What did you do with this bag of the substance then?

A. I picked it up and went home and smoked and came right back out.

. . . .

Q. Had you ever smoked crack cocaine before that?

A. Yes.

Q. And you smoked this substance that he threw out the window?

A. Yes, I smoked it.

Q. What was it?

A. Rock. That is what we call it. It was crack, it was drugs, my god it was drugs. We got high. It was drugs.

(Tr. 3022-24.)

Martinez could not recall in what year this incident had occurred. Before the grand jury, she had testified that it occurred in 1996 or 1997; at trial she could not even recall that testimony.

B. Hamilton's Assistance to Wharry in Maintaining a Crack House

The government's evidence to support Counts Three and Five against Hamilton was provided principally by Wharry and Gabriele. Wharry was one of Messere's informants who both sold and used crack. In March 2000, she lived in an apartment at 1213 First Avenue with Roger

Little (aka "Hodgy") and allowed others to use and sell crack there.

Wharry testified that Hamilton was well aware of her use of her residence as a crack house, in part because she would call Hamilton and inform him that drug dealers were there. She described one occasion on which she had called Hamilton to her prior residence on Eighth Avenue to tell him drug dealers were there. On that occasion, Hamilton responded that he was coming and instructed her to make sure the dealers did not flush anything down the toilet. When Hamilton arrived, he arrested the drug dealers. When he left, he told Wharry there were "cigarettes" upstairs (Tr. 986); Wharry then found crack cocaine upstairs in a cigarette box. This was consistent with her previous experiences with Hamilton. And she thereafter continued to provide Hamilton with information and to call him when drug dealers were in her home; Hamilton continued to come and take the dealers away; and he always left crack behind for Wharry. (*See* Tr. 984-88.)

In late 1999, Wharry moved her residence, and her operation of a crack house, from Eighth Avenue to 1213 First Avenue. Her relationship with Hamilton continued:

> Q. Did Mike Hamilton know that there was a crack house being operated at 1213 First Avenue during the time that you lived there?
>
> A. Yes.
>
> Q. How did he know that?
>
> A. It was obvious. There was so many drugs coming in and out of my house. I would always call him when the drug dealers were coming up there, and he would come up and bust them.

Q. Had he ever been in there and seen drugs without arresting people?

A. Yes.

(Tr. 999.) Wharry testified that she "receive[d] . . . protection from Mike Hamilton as [she was] running this crack house" (Tr. 1000); that she was able to find out about police activity and police raids from Siler and Hamilton (Tr. 995); and that she "never got arrested" (Tr. 999).

The government also called as a witness Antoinette Zwicker who testified that from the fall of 1999 and into 2000, she went to 1213 First Avenue to use drugs "pretty much every day." (Tr. 867.) Zwicker testified that she went there

> [b]ecause that was where I felt the most – I felt safest there. I felt like nothing was going to happen to me while I was using drugs there.
>
> . . . .
>
> Q. Why would you feel safe?
>
> A. I figured that nothing would happen if Darla was an informant for Hamilton.
>
> Q. Why did you think that?
>
> A. Because that is what she told me. I remember her calling him all the time, always calling him if she had any problems, if she wanted people out of the house or just for whatever, pretty much if she wanted people out of the house, and I just felt safe there because I figured nothing would happen.

(Tr. 867-68.)

The events of March 8, 2000, were described by Wharry, Zwicker, SPD Officer Gabriele, who was then working with a task force of DEA agents and SPD vice squad officers (the "Task Force"), and members of the Task Force. Gabriele testified that on March 8, the Task Force planned to have a confidential informant make a controlled buy of narcotics at 1213 First Avenue, and that in fact the informant made such a purchase of 9.5 grams of crack cocaine on that day.

In preparation for the controlled buy, the Task Force had positioned several vehicles to conduct surveillance of Wharry's building, and the informant had been fitted with a wire transmitter that enabled Gabriele to hear and record conversations carried on inside the building. At approximately 1:15 p.m., the Task Force surveillance was in place. At approximately 1:46 p.m., over the informant's wire, Gabriele heard the telephone ring in Wharry's house and then heard Wharry announce that Hamilton was on his way to pick up a wallet. At approximately 1:53 p.m., members of the Task Force observed Hamilton drive into the surveillance area. Recognizing the surveillance – as he later indicated to Wharry – Hamilton did not stop at Wharry's house but instead drove past. Task Force members observed him drive around the surveillance area for several minutes. Wharry came out of the building and walked to the sidewalk; for the next ten minutes or so she walked up and down the street, walked up the stairs, came back down, and looked up and down the street. She finally reentered the building. Inside her apartment, she was heard complaining that she had waited for Hamilton and that he had not shown up.

Hamilton then reached Wharry by telephone and persuaded her to meet him two blocks from the house.

Task Force members had observed Hamilton making calls on his cell phone, and telephone company records for that telephone showed that between 1:46 p.m. and 2:02 p.m., Hamilton called Wharry's number six times. At least four of those calls were made after Hamilton first drove into the surveillance net.

At 2:07 p.m. Task Force members observed Wharry meet Hamilton and enter the back seat of his car. Hamilton then drove out of the surveillance area; at 2:10 he was observed driving back into the area. A minute later, Wharry was observed getting out of Hamilton's car, and one Task Force member testified that she ran back to her building "looking back," with a "fearful look on her face. She looked terrified." (Tr. 929.)

Wharry testified that when she went out to meet Hamilton, there was a police van parked in front of her house.

> Q. How did you know it was a police van?
>
> A. Because when I went down and met Hamilton, he said, you see that van, right. I was like, yes. He looked at me, sure, yes. He won't tell me exactly. . . .

(Tr. 1003.) Wharry described her meeting with Hamilton as follows:

> Q. . . . . How is it that you happened to see Mike Hamilton on March 8, 2000?
>
> A. He had called me, and I went down and met him two blocks down, and he saw me. He wanted to talk to me.
>
> Q. Why did you meet him two blocks down?

A. You know, because he couldn't come in front of the house.

Q. Tell the jury what happened when you met Mike Hamilton that day?

A. I got in the car, and I ducked down because he said get down, and he did a U-turn, and *he asked me if I seen the van.* I say, yes. And he took me around. He asked me who was up in the house. He asked me if there was any drugs up there. I said no. He just kept going for a ride and talking to me.

Q. What else did he say to you?

A. You haven't been selling to nobody, right, you and Hodgy. He asked if me and Hodgy had been selling to anybody, and I said no. He said that the vice wanted me and Hodgy, to be careful.

. . . .

Q. Did he say anything else to you as he drove you around?

A. *He told me they were going to send somebody up with a wire.*

(Tr. 1003-05 (emphases added).)

When Wharry returned home from her meeting with Hamilton, Gabriele heard and recorded her conversation. On that tape, which was admitted over Hamilton's objection, Wharry tells those present that Hamilton has warned her that vice officers are after her and Hodgy, that they are sending someone up with a wire, and that Hamilton has told her to get out of the apartment (*see* GX 1-9.1T ("Hamilton, he's trying to keep me away from here, and I

was like, you know, 'Drop me off back' (UNI [*i.e.*, unintelligible]) and acting like he knows. They're getting ready to come up in here.")).

Zwicker, one of those present in Wharry's apartment on March 8, testified, without objection, that Wharry, when she returned to the apartment after seeing Hamilton,

> was upset, hysterically crying, just letting everybody know get out because Hamilton told me something is going on. I don't know. She was like she thought that the house was going to get raided. She didn't know exactly what was going on, but something was going on.
>
> Q. Had she just met with Hamilton?
>
> A. Yes.

(Tr. 872.)

C. The Verdicts and the Posttrial Motions

The jury acquitted Hamilton of witness tampering and acquitted both defendants of violating RICO. It found Messere guilty of distributing and possessing with intent to distribute crack to Martinez on July 19, 1998; it found Hamilton guilty of aiding and abetting Wharry's maintenance of a crack house on March 8, 2000, and of using a cellular telephone on that date to facilitate her maintenance of the crack house.

Hamilton and Messere moved under Fed. R. Crim. P. 29 for judgments of acquittal on the ground that the evidence was insufficient to support their convictions. They moved alternatively under Fed. R. Crim. P. 33 for

new trials on the principal grounds (a) that their convictions resulted from prejudicial spillover from the evidence on the RICO count on which they were acquitted, and (b) that their acquittals on the RICO count showed that the two defendants should have been tried separately. Messere also contended that the government had failed to disclose exculpatory evidence. In a Memorandum-Decision and Order dated April 1, 2002 ("District Court Opinion"), the district court denied both motions.

In denying the Rule 29 motion made by Hamilton, the district court stated that

> [t]here was more than enough evidence in the record to prove that 1213 First Avenue in Schenectady was a place maintained for the distribution or use of crack cocaine – *i.e.*, a "crack house." This evidence included the testimony of numerous witnesses, both law enforcement and drug users, that demonstrated unequivocally both that 1213 First Avenue was, during the period in question, a crack house and that Hamilton knew that 1213 First Avenue was a crack house.
>
> In addition, there was sufficient evidence – both direct and circumstantial – to prove that Hamilton aided and abetted the maintenance of 1213 First Avenue as a crack house on March 8, 2000, by warning Wharry that her house was under surveillance by law enforcement, and that he used a cell phone in doing so. This evidence included the testimony of law enforcement witnesses . . . , the tape recording made by the informant inside 1213 First Avenue, the billing records for Hamilton's cell phone (which indicated that Hamilton called the crack house six times between 1:46 p.m. and 2:02 p.m. on March

> 8, 2000), and the testimony of Antoinette Zwicker. As such, the evidence at trial was sufficient to sustain Hamilton's convictions on Counts Three and Five.

District Court Opinion at 3.

In denying the Rule 29 motion of Messere, the court noted his contentions that the testimony of Martinez showed that Messere had not distributed drugs to her on or about July 19, 1998, as alleged in the indictment, and that the government had failed to prove that the substance allegedly distributed by Messere on July 19, 1998, was crack cocaine. The court stated that

> [t]he jury could reasonably have found Messere guilty on Count Two based on the testimony introduced at trial. Martinez testified to receiving a substance from Messere that she picked up off the ground and determined it to be crack cocaine by smoking it. Siler testified that he was experienced with recognizing crack cocaine, and that he saw the substance Messere threw to Martinez on July 19, 1998, and that it appeared to be crack cocaine. The jury was free to accept or reject so much of the testimony as it saw fit, and it could reasonably have concluded that Siler, not Martinez, testified to the correct date of the distribution, and that the two witnesses were not, as Messere argues, referring to different events. In any event, Siler's testimony alone, if accepted by the jury, was sufficient to sustain the conviction on Count Two.

District Court Opinion at 4 (footnote omitted).

In denying defendants' motions under Rule 33 for a new trial, the district court concluded that there had been

no prejudicial spillover of evidence from the RICO count, on which defendants were acquitted, to the counts on which they were convicted. The court noted that every alleged RICO predicate act was alleged to have been performed by one or both of these defendants, that the evidence on the RICO count involved many of the same or similar facts as that on the other counts, that the RICO evidence was no more inflammatory than the other evidence, and that even to the extent that the evidence on the RICO count differed from that on the counts of conviction, much of the RICO evidence would have been admissible under Fed. R. Evid. 404(b) to prove defendants' motive, intent, or knowledge with respect to the remaining counts. *See* District Court Opinion at 6-7.

The court also rejected the contention of Hamilton and Messere that they were entitled to new trials on the ground that they should have been tried separately. Given the relationship between the RICO count and the other counts, and given the sufficiency of the evidence on the counts of conviction, the court concluded that defendants had not made the requisite showing of prejudice. *See id.* at 7 n.2.

Finally, the district court rejected Messere's contention that the government had failed to disclose exculpatory evidence. It found that the testimony of the witnesses in question, though conflicting with the testimony of Siler, "simply cannot be fairly characterized as 'exculpatory'" and that the discrepancies were fully explored on cross-examination. *Id.* at 8. Further, the court found that both of the allegedly undisclosed witnesses had been identified to the defense.

Defendants were eventually sentenced as indicated above, and these appeals followed.

II. DISCUSSION

On appeal, Hamilton and Messere contend principally that there was insufficient evidence to support their respective convictions. In addition, defendants pursue their contentions that they are entitled to new trials on the grounds that there was prejudicial spillover from the evidence on the RICO count; that they were prejudiced by being tried jointly, a joinder that they contend would have been improper in the absence of the RICO count; that the trial court erred in admitting tape recordings in evidence; and that the government failed to disclose exculpatory evidence and suborned perjury. Hamilton also contends that in calculating his sentence, see Part II.C. below, the district court misapplied the Sentencing Guidelines ("Guidelines"). We find no merit in any of defendants' contentions.

A. Sufficiency of the Evidence

In challenging the sufficiency of the evidence to support his conviction, a defendant bears a heavy burden. *See, e.g., United States v. Best,* 219 F.3d 192, 200 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001); *United States v. Autuori,* 212 F.3d 105, 114 (2d Cir. 2000). In reviewing such a challenge, we must credit every inference that could have been drawn in the government's favor, *see, e.g., United States v. Carson,* 702 F.2d 351, 361 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983), and affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable

doubt, *see, e.g., United States v. Buck,* 804 F.2d 239, 242 (2d Cir. 1986). The "testimony of a single accomplice" is sufficient to sustain a conviction "so long as that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt." *United States v. Gordon,* 987 F.2d 902, 906 (2d Cir. 1993). "[A]ny lack of corroboration goes only to the weight of the evidence, not to its sufficiency." *United States v. Roman,* 870 F.2d 65, 71 (2d Cir.), *cert. denied,* 490 U.S. 1109 (1989). The weight of the evidence is a matter for argument to the jury, not a ground for reversal on appeal. *Id.*

"[W]here there are conflicts in the testimony, we must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses," *United States v. Miller,* 116 F.3d 641, 676 (2d Cir. 1997), *cert. denied,* 524 U.S. 905 (1998); *see, e.g., United States v. Stratton,* 779 F.2d 820, 828 (2d Cir. 1985), *cert. denied,* 476 U.S. 1162 (1986); *United States v. LeRoy,* 687 F.2d 610, 616 (2d Cir. 1982), *cert. denied,* 459 U.S. 1174 (1983), "and to the jury's choice of the competing inferences that can be drawn from the evidence," *United States v. Morrison,* 153 F.3d 34, 49 (2d Cir. 1998). The same standards apply to the district court's consideration of an insufficiency argument in a motion under Fed. R. Crim. P. 29 for acquittal. *See, e.g., Autuori,* 212 F.3d at 114; *United States v. Guadagna,* 183 F.3d 122, 129 (2d Cir. 1999).

Applying these principles, we conclude that the sufficiency challenges of Hamilton and Messere must be rejected.

1. Hamilton

Under 18 U.S.C. § 2, a defendant may be convicted of aiding and abetting a given crime where the government proves that the underlying crime was committed by a person other than the defendant, that the defendant knew of the crime, and that the defendant acted with the intent to contribute to the success of the underlying crime. *See, e.g., United States v. Pipola,* 83 F.3d 556, 562 (2d Cir.), *cert. denied,* 519 U.S. 869 (1996); *United States v. Labat,* 905 F.2d 18, 23 (2d Cir. 1990); *United States v. Wiley,* 846 F.2d 150, 154 (2d Cir. 1988). Hamilton advances essentially four arguments in support of his contention that the evidence was insufficient to support his conviction of aiding and abetting the maintenance of a crack house (and, derivatively, his conviction for use of a cell phone to facilitate such maintenance). He contends (1) that the government failed to present evidence that he intended to assist a sale of narcotics at 1213 First Avenue on March 8, 2000 (*see, e.g.,* Hamilton brief on appeal at 14 ("The prosecution failed to call the buyer or the seller, or anyone else who may have had a proprietary interest in the deal or the crack-house on March 8, 2000.")); (2) that the drug sale at 1213 First Avenue on March 8 had been concluded before he conversed with Wharry, and a person cannot properly be convicted of aiding and abetting a crime that has "already [been] completed" (*id.* at 22); (3) that there was no proof "that the substance involved was actually a narcotic" (*id.* at 20); and (4) that any inference that he sought to help maintain 1213 First Avenue as a crack house was "totally inconsistent" with testimony from Siler that Hamilton had submitted a "tip-sheet" to SPD's vice squad stating that 1213 First Avenue was a known drug location to be investigated (*id.* at 14). Hamilton's contentions provide no basis for reversal.

Hamilton's first two arguments misperceive the substance of Count Three of the indictment. That count did not charge Hamilton with aiding and abetting a sale of narcotics; rather it charged him with aiding and abetting the crime of "knowingly . . . maintain[ing] any place for the purpose of . . . distributing [] or using any controlled substance." 21 U.S.C. § 856(a)(1). An actual sale of narcotics at 1213 First Avenue on March 8, 2000, was not an element of that offense so long as the premises were being maintained on that date for any of the forbidden purposes. And although Hamilton correctly points out that a person cannot be found guilty of aiding and abetting a crime that already has been committed, *see, e.g., United States v. Freeman,* 498 F.2d 569, 575 (2d Cir. 1974), the offense that Hamilton was alleged to have aided and abetted – maintenance of 1213 First Avenue as a crack house – was then ongoing; whether or not the sale made on that date had been completed when Hamilton spoke to Wharry was immaterial.

As to the elements of the § 856(a)(1) offense, there was, as the district court concluded in denying Hamilton's Rule 29 motion, *see* Part I.C. above, more than sufficient evidence that 1213 First Avenue was being maintained from late 1999 through March 8, 2000, for the purposes of distributing and using crack cocaine; and as described in Part I.B. above, there was abundant evidence that Hamilton knew the nature of that use. Further, the testimony of Wharry and Zwicker, habitual crack users, was plainly adequate to permit the jury to find beyond a reasonable doubt that the substance distributed and used on those premises was crack cocaine.

Finally, the evidence was ample to permit the inference that Hamilton's actions on March 8, including the

numerous calls on his cell phone to Wharry's apartment, were designed to warn Wharry that police surveillance vehicles were present, that the arrival of an informant wearing a wire was imminent, and that Wharry's engaging in any actual selling of drugs at that time would be perilous. Although Hamilton contends that there was evidence that was "totally inconsistent" with such an inference, the decision as to which of any conflicting accounts was to be credited was a matter for the jury. Given the evidence of Hamilton's past pattern of actions in aid of Wharry's operation of her residences as crack houses, the jury could easily infer that Hamilton's actions on March 8 were intended to help her to continue operating 1213 First Avenue as a crack house. We may not overturn that determination.

2. Messere

Messere argues that the evidence was insufficient to convict him of possession of crack with intent to distribute on or about July 19, 1998, because, although Siler testified that Messere threw crack cocaine from the police car for Martinez on that date, that testimony was not substantiated by Martinez or any other witness. Messere argues that his conviction should be reversed because the "witness accounts were entirely contradictory" and because the government "failed to establish that . . . the substance in question was cocaine base." (Messere brief on appeal at 9.) We reject both contentions.

Siler's testimony provided evidence of all of the elements of the offense, including the nature of the substance thrown as crack cocaine. Any lack of corroboration for his testimony or any conflicting testimony was a

matter to be argued to the jury, not a ground for reversal on appeal. We conclude that the evidence was sufficient for the reasons stated by the district court, *see* Part I.C. above, in denying Messere's Rule 29 motion.

B. The Claims of Retroactive Misjoinder and Prejudicial Spillover

Hamilton and Messere contend that if their convictions are not reversed outright, they are entitled to new trials on the principal grounds that there was "retroactive misjoinder" in light of their acquittals on the RICO count of the indictment, that they suffered from prejudicial spillover of the evidence introduced on the RICO count, and that each defendant suffered from prejudicial spillover of the evidence that was introduced against the other. These contentions, which are intertwined, lack merit.

The term "retroactive misjoinder" refers to circumstances in which the "joinder of multiple counts was proper initially, but later developments – such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions – render the initial joinder improper." *United States v. Jones,* 16 F.3d 487, 493 (2d Cir. 1994); *see, e.g., United States v. Vebeliunas,* 76 F.3d 1283, 1293-94 (2d Cir.), *cert. denied,* 519 U.S. 950 (1996); *United States v. Novod,* 927 F.2d 726, 728 (2d Cir.), *cert. denied,* 500 U.S. 919 (1991). In order to be entitled to a new trial on the ground of retroactive misjoinder, a defendant "must show compelling prejudice." *Vebeliunas,* 76 F.3d at 1293; *Jones,* 16 F.3d at 493; *Novod,* 927 F.2d at 728. Such "compelling prejudice" may be found where there is "[p]rejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal." *Jones,* 16 F.3d at 493; *see generally Vebeliunas,*

76 F.3d at 1293; *Novod,* 927 F.2d at 728. The concept of prejudicial spillover – the only prejudice asserted by Hamilton and Messere to have resulted from the alleged retroactive misjoinder here – requires an assessment of the likelihood that the jury, in considering one particular count or defendant, was affected by evidence that was relevant only to a different count or defendant. *See generally United States v. Tellier,* 83 F.3d 578, 582 (2d Cir.), *cert. denied*, 519 U.S. 955 (1996); *United States v. Barton,* 647 F.2d 224, 241 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981).

In *Jones,* the defendant was initially charged with armed bank robbery, bank robbery involving an assault, and use of a firearm during a crime of violence. His first trial resulted in a mistrial, with 10 jurors voting to acquit. The government then filed a superseding indictment, realleging those three counts and adding two new charges – counts four and five – of being a felon in possession of a firearm. Jones moved to have counts one, two, and three tried separately from counts four and five in order that the jury, when considering the first three counts, not learn and be influenced by the fact that he was a convicted felon. The district court severed count five but not count four, and at his second trial Jones was convicted on all four counts. This Court reversed the conviction on count four, however, because the government had failed to prove one element of that offense, to wit, that the firearm had traveled in interstate commerce. *See* 16 F.3d at 492. Comparing the results of the two trials, we concluded that Jones was entitled to a new trial on the first three counts because the second jury had likely been influenced by the evidence – relevant only to the unproven count – that Jones was a convicted felon. *See id.* at 493.

In the wake of *Jones*, we have articulated a three-part test for determining whether there was likely prejudicial spillover from the evidence submitted in support of convictions that were set aside after trial. We consider (1) whether the evidence introduced in support of the vacated count "was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts," (2) whether the dismissed count and the remaining counts were similar, and (3) whether the government's evidence on the remaining counts was weak or strong. *Vebeliunas*, 76 F.3d at 1294 (internal quotation marks omitted); *see United States v. Wapnick*, 60 F.3d 948, 953-54 (2d Cir. 1995), *cert. denied*, 517 U.S. 1187 (1996); *United States v. Rooney*, 37 F.3d 847, 855-56 (2d Cir. 1994). The first prong of this test is not met where "the evidence that the government presented on the reversed counts was, as a general matter, no more inflammatory than the evidence that it presented on the remaining counts." *United States v. Morales*, 185 F.3d 74, 83 (2d Cir. 1999), *cert. denied*, 529 U.S. 1010 (2000). As to the second factor, *i.e.*, the degree of similarity between dismissed and surviving counts, prejudicial spillover is unlikely if the dismissed count and the remaining counts were either quite similar or quite dissimilar:

> In cases where the vacated and remaining counts emanate from similar facts, and the evidence introduced would have been admissible as to both, it is difficult for a defendant to make a showing of prejudicial spillover. . . . By the same token, where the vacated and remaining counts arise out of completely distinct fact patterns, and the evidence as to both counts is readily separable, there is also no prejudicial spillover.

Wapnick, 60 F.3d at 954.

> It is only in those cases in which evidence is introduced on the invalidated count that would otherwise be inadmissible on the remaining counts, *and* this evidence is presented in such a manner that tends to indicate that the jury probably utilized this evidence in reaching a verdict on the remaining counts, that spillover prejudice is likely to occur.

Rooney, 37 F.3d at 856 (emphasis in original).

We found such a prejudicial presentation in *Tellier,* 83 F.3d 578, in which Roy Tellier was convicted of committing a single robbery in violation of the Hobbs Act, 18 U.S.C. § 1951, and of violating RICO. The indictment charged him with only two predicate acts of racketeering activity; with respect to one of those acts, we concluded that the admissible evidence was legally insufficient. As the government thus had proven only one act of racketeering activity, we reversed the RICO conviction on the ground that the evidence was legally insufficient to establish the necessary "pattern" of racketeering activity. 83 F.3d at 581. Turning to the question of whether the RICO evidence might have affected the jury's consideration of the Hobbs Act count, we noted that "[a] RICO charge allows the government to introduce evidence of criminal activities in which a defendant did not participate to prove the enterprise element," *id.* at 582; that an "enormous amount," *id.* at 581, of evidence had been introduced "to prove the RICO 'enterprise' and its extensive criminal activities," *id.* at 582; and that all but a "tiny sliver of the evidence admitted on the RICO charges" was irrelevant to Tellier's alleged Hobbs Act robbery, *id.* We also observed that the government's brief on appeal contained a 43-page "description of the defendants' crimes," including "fifteen major robberies, four murders, one attempted murder, two sales

of stolen drugs, and one bribery of a witness." *Id.* at 582. We concluded that Tellier was entitled to a new trial on the Hobbs Act count because prejudicial spillover was indisputable.

In contrast, where the record indicates that the jury was able to distinguish between counts or between defendants, and to assess separately the evidence pertinent to each, we have found no basis for concluding that a new trial was warranted because of prejudicial spillover. The absence of such spillover is most readily inferable where the jury has convicted a defendant on some counts but not on others. *See, e.g., Morales,* 185 F.3d at 83 (no spillover between counts); *United States v. Friedman,* 854 F.2d 535, 564 (2d Cir. 1988) (no spillover between counts), *cert. denied,* 490 U.S. 1004 (1989); *id.* at 563 (no spillover between defendants); *United States v. Casamento,* 887 F.2d 1141, 1153 (2d Cir. 1989) (same), *cert. denied,* 493 U.S. 1081 (1990); *United States v. Orozco-Prada,* 732 F.2d 1076, 1086 (2d Cir.) (same), *cert. denied,* 469 U.S. 845 (1984); *United States v. Carson,* 702 F.2d at 367 (same). Indeed, so far as we are aware, no case has held that a defendant was entitled, on the ground of retroactive misjoinder, to a new trial on the counts of conviction simply because the jury found the government's proof on other counts unpersuasive.

Although Hamilton and Messere contend that two of our cases have so held, citing *United States v. Ferguson,* 246 F.3d 129 (2d Cir. 2001), and *United States v. Sam Goody, Inc.,* 675 F.2d 17 (2d Cir. 1982), their descriptions of those cases are entirely inaccurate. They describe *Ferguson* as "reversing convictions in light of spillover prejudice effect of acquitted RICO count evidence." (Hamilton brief on appeal at 34; Messere brief on appeal at 31.)

But in *Ferguson,* the district court had granted a new trial, and we affirmed. Further, our affirmance was not on the ground advanced by Hamilton and Messere. The district court in *Ferguson*, after weighing the evidence, had concluded that the "evidence [was] unsatisfactory or insufficient to support the jury's finding of guilt beyond a reasonable doubt," *see* 246 F.3d at 137, and we ruled that the grant of a new trial for that reason was not an abuse of discretion. Although the district court had secondarily, *see id.,* expressed concern that there might have been prejudicial spillover from the evidence on counts on which the jury acquitted the defendant, we emphasized that the court had made the requisite analysis of the totality of the case. *See id.* at 136. And we stated that, because only the counts of conviction could be retried, any "[c]oncerns about prejudicial spillover . . . are moot," and that the fact that there were acquittals "need not [be] discuss[ed]." *Id.* at 137.

Defendants misdescribe our decision in *Sam Goody* as "sustaining trial court's reversal of defendant's conviction 'in the interests of justice' . . . due to 'distinct risk' that the jury had been improperly influenced by the allegations of the acquitted RICO count." (Messere brief on appeal at 31-32; *see* Hamilton brief on appeal at 34.) In fact, in that case the government had appealed the district court's grant of a new trial, and we dismissed the appeal for lack of appellate jurisdiction. *See* 675 F.2d at 20-25. Further, both the majority and concurring opinions in *Sam Goody* in fact saw little or no risk of prejudicial spillover, precisely because the jury had acquitted the defendant on some counts. *See, e.g., id.* at 26-27 n.9 (majority opinion: "the likelihood that the jury's deliberations were tainted by the RICO allegation is far less than the likelihood

found in [*United States v.*] *Guiliano,* [644 F.2d 85, 88-89 (2d Cir. 1981)], for here, unlike *Guiliano* [in which convictions on certain counts were reversed on appeal for lack of sufficient evidence], the jury acquitted on the RICO count that was submitted to it"); *id.* at 29 (concurring opinion of Mansfield, J.: "Since the jury in the present case acquitted on the RICO count and the evidence on the other counts was the same, there could not have been any such prejudicial spillover."). In sum, neither *Ferguson* nor *Sam Goody* stands for the proposition that this Court has ordered a new trial on the ground of retroactive misjoinder or prejudicial spillover simply because a jury found some counts unproven.

Even if the retroactive misjoinder concept were to be applied where there has been no ruling that evidence on any given count was legally insufficient but merely a judgment by the jury that the government's proof on that count was unpersuasive, Hamilton and Messere have not met the "compelling prejudice" test. The evidence on the RICO count here was surely no more inflammatory than the evidence on the counts of conviction, and the RICO count focused solely on the acts of Hamilton and Messere themselves rather than on the conduct of other persons. The government had no need here, as in *Tellier* for example, to introduce evidence as to "criminal activities in which [Hamilton or Messere] did not participate," 83 F.3d at 582, in order to establish the existence of a RICO enterprise. The alleged RICO enterprise in this case was the Schenectady Police Department, an entity that may properly be considered an enterprise within the meaning of RICO, *see, e.g., United States v. Grzywacz,* 603 F.2d 682, 685-87 (7th Cir. 1979) (police department), *cert. denied,* 446 U.S. 935 (1980); *United States v. Brown,* 555 F.2d 407,

415-16 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (police department); *United States v. Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980) (county sheriff's department); *see also United States v. Angelilli*, 660 F.2d 23, 31 (2d Cir. 1981) (New York civil court system), *cert. denied*, 455 U.S. 910 (1982). No proof of the conduct of any person was needed to establish existence of the enterprise. Further, the indictment on which Hamilton and Messere were tried did not allege any predicate acts of racketeering activity by any person other than Hamilton or Messere.

Moreover, most of the conduct involved in the 12 RICO predicate acts would have been admissible at trial in the absence of a RICO count. Two of the predicate acts involved conduct identical to that alleged in Counts Two and Three of the indictment. Another predicate act involved distribution of drugs by Hamilton to Wharry, conduct that Wharry testified Hamilton had engaged in many times in assisting her to maintain her homes as crack houses by, *inter alia*, always responding to Wharry's calls, coming to remove drug dealers from her home, and leaving at least some of their drugs for her. Thus, evidence of the conduct charged in three RICO predicate acts clearly overlapped the evidence of conduct alleged in the counts of conviction.

In addition, much of the evidence on the other nine RICO predicate acts would, in the absence of a RICO count, have been admissible under Fed. R. Evid. 404(b). Six of the nine involved other instances in which Messere distributed controlled substances, proof of which would have been admissible to show a pattern of actions contrary to his suggestion that what he distributed on July 19 was not a controlled substance and to show his knowledge of the nature of the substance. In one of those six predicate

acts, Hamilton was alleged to have participated with Messere in the distribution of narcotics to an informant, proof of which would likely have been admissible to show Hamilton's knowledge and intent with respect to narcotics use by his informants. And even if not admissible under Rule 404(b), proof of that one additional instance of narcotics distribution by Hamilton could hardly have been as startling as the evidence from Wharry and Zwicker of the repeated instances in which Hamilton helped Wharry maintain her crack house by, *inter alia*, responding to Wharry's calls and removing the drug dealers, but leaving behind a quantity of crack for Wharry "every time" (Tr. 987-88; *id.* at 986 ("I knew I was always going to get something")).

Finally, although the three remaining alleged predicate acts were not of the same genre, in that they involved witness tampering rather than drug distributions, the evidence presented in support of those allegations could not be said to have had any spillover effect on the jury, for on Count Four, on the only non-RICO count alleging witness tampering, the jury returned a verdict of not guilty.

In sum, we cannot conclude that the evidence introduced on the RICO count was substantially different from, or any more inflammatory than, the evidence introduced with respect to the counts on which defendants were convicted. As the government's evidence supporting the counts of conviction was ample, the district court properly denied defendants' motions for new trials on grounds of retroactive misjoinder or prejudicial spillover.

C. Other Challenges to the Convictions

Defendants also contend that they were entitled to a new trial because of errors in the admission of evidence and alleged derelictions of the government with respect to disclosures and veracity of evidence. We are unpersuaded.

1. Objection to Tape Recordings

Hamilton and Messere contend that the district court erred in admitting in evidence the tape recording made by Gabriele of the March 8 conversations inside Wharry's house, as transmitted by the informant (who was known as "Supreme") and heard by Gabriele, as well as a tape recording of a conversation on April 11, 2000, between Supreme and one of Messere's informants, Seba Richards. Defendants argue that the tapes were not reliable because Supreme had supplied some of the participants in the conversations with drugs:

> The district court should properly have excluded these tape recordings, on the grounds raised by the defense – namely that they were the product of rambling, crack-intoxicated individuals who had been intentionally placed into that state by a Government informant seeking to obtain information for use by the Government.

(Hamilton brief on appeal at 60; Messere brief on appeal at 55; *see also id.* at 53 ("[T]he district court erred in admitting these tape recordings, obtained through Government agent 'supreme' giving crack cocaine to Ms. Martinez and Ms. Richards as inducements to speak.").) In support of their contention, defendants cite cases from other circuits, *United States v. Starks,* 515 F.2d 112 (3d Cir. 1975); *United States v. McMillan,* 508 F.2d 101 (8th

Cir. 1974), *cert. denied*, 421 U.S. 916 (1975), which adopted a formal, seven-factor approach to the admission of audio recordings as enunciated in *United States v. McKeever*, 169 F.Supp. 426, 430 (S.D.N.Y. 1958), *rev'd on other grounds*, 271 F.2d 669 (2d Cir. 1959), including a requirement of proof that statements elicited were made "without any kind of inducement." *Starks*, 515 F.2d at 121 n.11 (quoting *McKeever*); *McMillan*, 508 F.2d at 104 (same). This Court, however, has expressly and repeatedly declined to adopt the *McKeever* approach, refusing to "adopt[ ] a rigid standard for determining the admissibility of tape recordings." *United States v. Fuentes*, 563 F.2d 527, 532 (2d Cir. 1977), *cert. denied*, 434 U.S. 959 (1977); *see also United States v. Sliker*, 751 F.2d 477, 500 (2d Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985). In *Fuentes*, we noted that "the varying circumstances of particular cases in which one or another aspect of this problem may present itself militate against our adoption of inflexible criteria applicable to all cases." 563 F.2d at 532. Instead, "we have adopted a general standard, namely, that the government 'produce clear and convincing evidence of authenticity and accuracy' as a foundation for the admission of such recordings." *Id.* (quoting *United States v. Knohl*, 379 F.2d 427, 440 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967)). We see no reason to adopt a more rigid standard in this case. A tape recording may be admitted in evidence when it has been properly authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a); *see, e.g., United States v. Tropeano*, 252 F.3d 653, 661 (2d Cir. 2001); *United States v. Barone*, 913 F.2d 46, 49 (2d Cir. 1990). Once a relevant tape recording has been sufficiently authenticated, any question as to the veracity of the recorded statements and

the credibility of the speakers goes to the evidence's weight rather than to its admissibility.

The recordings admitted in evidence in the present case were adequately authenticated, both by Gabriele, who heard the conversations and made the recordings, and by various parties to the conversations. Hamilton and Messere do not challenge the authenticity or accuracy of the recordings; rather they challenge the veracity and reliability of the statements that were recorded. These were matters for argument to the jury; they are not grounds for reversal on appeal.

2. Claims of Nondisclosure and Perjury

Defendants' additional contentions that the government failed to disclose exculpatory evidence and suborned perjury by Gabriele do not warrant extended discussion. We reject the nondisclosure contention because the items of evidence to which defendants point were either not exculpatory, or were not otherwise likely to impact a witness's credibility in such a way as to undermine a critical element of the government's case, *see, e.g.*, *United States v. Wong,* 78 F.3d 73, 79 (2d Cir. 1996), or were disclosed to defendants in a sufficiently timely manner. We reject the perjury contention because we see no basis in the record for a conclusion that Gabriele intentionally gave false testimony.

D. Hamilton's Challenge to His Sentence

For a defendant convicted of aiding and abetting, "[t]he offense level is the same level as that for the underlying offense." Guidelines § 2X2.1. The guideline applicable to a defendant convicted of violating 21 U.S.C. § 856 is

Guidelines § 2D1.8, which "covers the offense of knowingly . . . maintaining . . . any building, room, or enclosure for the purpose of . . . distributing[ ] . . . or using a controlled substance contrary to law (*e.g.*, a 'crack house')." Guidelines § 2D1.8 *Background*.

Section 2D1.8, provides, in part, that such a defendant's offense level is "[t]he offense level from § 2D1.1 applicable to the underlying substantive offense." Guidelines § 2D1.8(a)(1). Section 2D1.1 links a defendant's base offense level to the quantity of narcotics involved in his relevant conduct. A defendant's relevant conduct includes

> (1)(A) all acts . . . committed, aided, [or] abetted . . . by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction. . . .

Guidelines § 1B1.3(a)(1).

In sentencing Hamilton under these sections, the district court found by a preponderance of the evidence that Hamilton "knew that 1213 First Avenue was a crack house in which numerous illegal crack cocaine transactions had occurred" (Sentencing Transcript, May 16, 2002 ("S.Tr."), at 13), and that when Hamilton talked to Wharry on March 8, 2000, and warned her about the police surveillance, he believed, based on his observation of the

surveillance and "on the circumstances and his experience as a police officer, . . . that a drug transaction was or was about to take place in the crack house" (S.Tr. 13-14). The court found that Hamilton was accountable for the 9.5 grams of crack sold to the confidential informant in the controlled buy on that date "because, based on his knowledge and experience as a police officer, the participants and the entire circumstances by a preponderance of the evidence the quantity of drugs was reasonably foreseeable by him." (S.Tr. 14-15.) Based on that drug quantity, Hamilton's base offense level was 26; after a two-step upward adjustment under Guidelines § 3B1.3 for abuse of a public trust, his total offense level was 28. Given his criminal history category of I, the Guidelines-recommended range of imprisonment was 78-96 months. The district court departed downward from that range and sentenced Hamilton to a prison term of 54 months on Count Three, and a 48-month term on count Five, to be served concurrently.

Hamilton challenges his sentence, arguing principally (1) that the 9.5-gram quantity of crack sold on March 8 was not reasonably foreseeable to him, and (2) that under subsection (a)(2) of Guidelines § 2D1.8, which provides that

> [i]f the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises, the offense level shall be 4 levels less than the offense level from § 2D1.1 applicable to the underlying substantive offense,

Guidelines § 2D1.8(a)(2), his total offense level should have been no more than 24. We reject both contentions.

In reviewing a sentence imposed under the Guidelines, we may not overturn the district court's findings of fact "unless they are clearly erroneous," and we must give "due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e). We will not overturn the court's application of the Guidelines to the facts before it unless we conclude that there has been an abuse of discretion. *See, e.g., United States v. Santiago,* 906 F.2d 867, 871 (2d Cir. 1990).

We see no error, much less clear error, in the district court's findings that Hamilton knew that 1213 First Avenue was being used as a crack house, that he recognized that there was police surveillance of that house on March 8, and that he warned Wharry of that surveillance. Indeed, these facts were elements of or integral to the crack-house-maintenance offense that the jury permissibly found proven beyond a reasonable doubt. In addition, the court's finding that Hamilton, based on his police experience, believed that a controlled transaction was to take place and that a transaction of 9.5 grams of crack was reasonably foreseeable to him is not clearly erroneous. We see no abuse of discretion in the court's application to Hamilton of the base offense level set by Guidelines § 2D1.1 for the quantity of crack that was sold on the premises on one of the very days on which Hamilton was shown to be acting to protect Wharry's maintenance of the premises as a crack house.

Nor is there merit in Hamilton's contention that he was entitled to a four-step reduction in offense level under § 2D1.8(a)(2) on the ground that he had no participation in the underlying controlled substance offense other than allowing use of the premises. The commentary to § 2D1.8 states, *inter alia*, that

> subsection (a)(2) does not apply unless the defendant initially leased, rented, purchased, or otherwise acquired a possessory interest in the premises for a legitimate purpose.

Guidelines § 2D1.8 Application Note 1. Nothing in the record suggests that Hamilton leased, rented, purchased, or otherwise acquired a possessory interest in 1213 First Avenue at all, and at oral argument of this appeal his attorney confirmed to this Court that Hamilton had no such ownership or proprietary interest. Accordingly, the subsection (a)(2) reduction was not available to Hamilton.

CONCLUSION

We have considered all of defendants' arguments on these appeals and have found them to be without merit. The judgments are affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

01-CR-227

MICHAEL HAMILTON and
NICOLA MESSERE,

Defendants.

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DAVID N. HURD
United States District Judge

MEMORANDUM-DECISION AND ORDER

(Filed Apr. 1, 2002)

I. INTRODUCTION

On January 17, 2002, defendant Michael Hamilton ("Hamilton") was convicted on Count Three (aiding and abetting the maintenance of a place for the purpose of distributing and using crack cocaine, in violation of 21 U.S.C. § 856(a)(1)) and Count Five (using a cellular telephone to facilitate the maintenance of a place for the purpose of distributing or using crack cocaine, in violation of 21 U.S.C. § 843(b)). Defendant Nicola Messere ("Messere") was convicted on Count Two (possession with intent to distribute and distribution of crack cocaine). Both defendants were acquitted of the remaining two counts in the five-count superseding indictment, including Count One (RICO).

Each defendant now moves for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, or alternatively, for a new trial pursuant to Federal Rule of Criminal Procedure 33. Oral argument was held on March 21, 2002, in Utica, New York. Decision was reserved.

II. DISCUSSION

The motions of each defendant are discussed in turn below.

A. Rule 29 Motions

1. Michael Hamilton

Hamilton moves for a judgment of acquittal on the grounds that the Government failed to prove either that 1213 First Avenue was a crack house or that Hamilton aided and abetted its operation. Hamilton's contentions in support of this motion are (1) that the evidence failed to establish that any material used at 1213 First Avenue on or about March 8, 2000, was crack cocaine; (2) Hamilton had no knowledge that crack cocaine was being used or distributed at 1213 First Avenue on or about March 8, 2000; (3) Hamilton did not knowingly warn Darla Wharry ("Wharry") that 1213 First Avenue was under surveillance on March 8, 2000; and (4) that his cell phone was used for a legitimate purpose.

Defendant Hamilton's motion for a judgment of acquittal must be denied. There was more than enough evidence in the record to prove that 1213 First Avenue in Schenectady was a place maintained for the distribution or use of crack cocaine – *i.e.*, a "crack house." This evidence included the testimony of numerous witnesses, both law

enforcement and drug users, that demonstrated unequivocally both that 1213 First Avenue was, during the period in question, a crack house and that Hamilton knew that 1213 First Avenue was a crack house.

In addition, there was sufficient evidence – both direct and circumstantial – to prove that Hamilton aided and abetted the maintenance of 1213 First Avenue as a crack house on March 8, 2000, by warning Wharry that her house was under surveillance by law enforcement, and that he used a cell phone in doing so. This evidence included the testimony of law enforcement witnesses DEA Agents Marano and McDermott, Detective Gabriele, and Investigator Grimm, the tape recording made by the informant inside 1213 First Avenue, the billing records for Hamilton's cell phone (which indicated that Hamilton called the crack house six times between 1:46 p.m. and 2:02 p.m. on March 8, 2000), and the testimony of Antoinette Zwicker. As such, the evidence at trial was sufficient to sustain Hamilton's convictions on Counts Three and Five.

2. Nicola Messere

Messere moves for a judgment of acquittal on the grounds that the evidence adduced at trial was insufficient to sustain a conviction on Count Two. Messer's arguments in support of his motion are (1) that the evidence failed to establish a distribution of crack cocaine by Messer on or about July 19, 1998; and (2) that the Government failed to prove that the substance distributed by Messer on July 19, 1998, was crack cocaine. Messer argues that Tina Martinez ("Martinez") unequivocally testified that no distribution occurred on or about the date charged in Count Two,

and that the testimony of Michael Siler ("Siler") was insufficient to prove that the substance allegedly distributed was crack cocaine.

The jury could reasonably have found Messer guilty on Count Two based on the testimony introduced at trial. Martinez testified to receiving a substance from Messere that she picked up off the ground and determined it to be crack cocaine by smoking it. Silver testified that he was experienced with recognizing crack cocaine, and that he saw the substance Messere threw to Martinez on July 19, 1998, and that it appeared to be crack cocaine. The jury was free to accept or reject so much of the testimony as it saw fit, and it could reasonably have concluded that Siler, not Martinez, testified to the correct date of the distribution, and that the two witnesses were not, as Messere argues, referring to different events.[1] In any event, Siler's testimony alone, if accepted by the jury, was sufficient to sustain the conviction on Count Two. *See United States v. Bryce*, 208 F.3d 346, 353 (2d Cir. 2000) ("A defendant may be convicted of narcotics possession of some evidence – direct, circumstantial, or otherwise – establishes the defendant's possession of the illegal substance.") Messere's motion for a judgment of acquittal must be denied.

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[1] In addition, Messere argues that Siler was not credible because of his status as a cooperating witness and because of discrepancies concerning certain alleged witnesses to the distribution. Such credibility determinations, which are properly made by the jury, may not be disturbed on a Rule 29 motion. *See United States v. Dhinsa*, 243 F.3d 635, 649, *cert. denied*, 151 L.Ed.2d 156 (2001).

B. Rule 33 Motions

Both defendants move for a new trial on the grounds that (1) that there was prejudicial spillover from the RICO evidence; (2) the proposed surprise witness, Schenectady Police Officer Patrick Horan, prevented an effective defense; and (3) the cumulative effect of these factors, combined with the weight of the evidence, warrants a new trial. In addition, Messere argues that he is entitled to a new trial because the Government failed to disclose exculpatory evidence – namely, that the witnesses Maria Colla ("Colla") and Laura Fenty ("Fenty") directly contradicted Michael Siler's testimony regarding the distribution alleged in Count Two. None of these requires a new trial.

1. Prejudicial spillover

A court is required to consider the following three factors when analyzing a defendant's claim of prejudicial spillover: (1) whether the evidence in support of the dismissed counts was inflammatory, such that it would tend to incite the jury to convict on the remaining counts; (2) the degree of similarity or overlap between the dismissed counts and the remaining counts; and (3) the strength of the Government's case on the remaining counts. *See, e.g., United States v. Morales*, 185 F.3d 74, 82-83 (2d Cir. 1999), *cert. denied* 529 U.S. 1010 (2000); *United States v. Vebeliunas*, 76 F.3d 1283, 1294 (2d Cir. 1996). A review of these factors demonstrates that defendants' prejudicial spillover arguments lack merit.

First, the evidence presented by the Government on the RICO count was no more inflammatory than the evidence presented on the remaining counts. All of the evidence presented by the Government went to the same

pattern of conduct – *i.e.*, the distribution of drugs to informants by the defendants, and their alleged efforts to conceal their activities. Such evidence, presented in the context of a RICO charge on which the defendants were acquitted, was no more likely to "incite" the jury to convict on the remaining counts than if it had been admitted as evidence of motive, intent, plan, or knowledge pursuant to Federal Rule of Evidence 404(b). In addition, it is noted that the mere fact that a RICO count was unsuccessfully charged does not suffice to establish prejudice. *See Vebeliunas*, 76 F.3d at 1294.

With regard to the second factor, the evidence in support of the RICO count did stem from many of the same or similar facts as the evidence on the remaining counts, and much would have been admissible pursuant to Rule 404(b) to prove motive, intent, or knowledge on the part of the defendants as to the remaining counts. In addition, much of the evidence was relevant as background information to explain the circumstances surrounding the conduct charged in Counts Two through Five of the superseding indictment.

As to the third factor, the relative strength of the Government's case against each defendant was discussed briefly above, and will not be repeated here. It is merely noted that the evidence adduced at trial against Hamilton and Messere was more than sufficient for a reasonable jury to convict each of them on the counts on which they were found guilty. As such, their claims of prejudicial spillover are rejected.

Notwithstanding the foregoing, both defendants assert that a new trial is required by *United States v. Tellier*, 83 F.3d 578 (2d Cir. 1996), because the evidence in

support of the failed RICO count inevitably prejudiced the jury to convict on the other counts. *Tellier*, however, is easily distinguished from the instant case. In *Tellier*, the defendant was charged with two predicate acts as part of a RICO enterprise whose description by the Government was "forty-three pages long and recite[d] fifteen major robberies, four murders, one attempted murder, two sales of stolen drugs, and one bribery of a witness." *Tellier*, 83 F.3d at 582. In contrast, these defendants were the subject of every predicate act alleged in the RICO count, and the counts on which they were convicted were similar and related to the alleged predicate acts. As such, *Tellier* does not compel a new trial in this case.[2]

2. Surprise witness

With regard to the claim that they were unfairly prejudiced by the proposed testimony of Schenectady Police Officer Patrick Horan, this argument is rejected. The Government disclosed Officer Horan as a potential witness to the defense immediately upon learning of his willingness to testify in this case. The defendants successfully argued that his testimony not be permitted as part of the Government's direct case. Thereafter, both defendants had the opportunity to present whatever defense they chose. They could have mounted vigorous defenses and

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[2] Defendants also seem to be arguing that, given the acquittal on the RICO count, they were improperly joined as defendants for trial. To the extent that they are raising the issue of "'retroactive misjoinder,'" they have failed to demonstrate the requisite "'compelling prejudice.'" *Vebeliunas*, 76 F.3d at 1293 (quoting *Untied [sic] States v. Novod*, 927 F.2d 726, 728 (2d Cir. 1991)).

addressed the rebuttal testimony of Officer Horan, if any, through cross-examination and through their own witnesses on sur-rebuttal. The mere fact that each defendant made the strategic decision not to put on a defense case is not a sufficient reason to grant a new trial. *See United States v. Pordum*, 451 F.2d 1015, 1017 (2d Cir. 1971) (where defense knew of witness' testimony, but elected not to call him because of trial strategy, "[t]o permit the [defendants] to change their strategy after an adverse verdict would be improper.").

3. Cumulative effect

The defendants argue that the cumulative effect of the errors they identify, coupled with the relatively weak evidence against them, warrants a new trial for each. This argument is also rejected. As discussed above, none of defendants' contentions warrant a new trial, and the evidence against each was sufficient to sustain their convictions. Accordingly, the cumulative effect of these arguments does not require a new trial for either defendant.

4. Failure to disclose exculpatory evidence

Finally, Messere's argument that he is entitled to a new trial because the Government failed to disclose exculpatory evidence is rejected. The Government did not fail to disclose any such evidence in this case. The testimony of Fenty and Colla, though inconsistent with that of Siler, simply cannot be fairly characterized as "exculpatory." In any event, both witnesses were identified to the defense, and testified in this case. The discrepancies

between their testimony, and that of Siler, were fully explored on cross-examination. As such, a new trial is not warranted for this reason.

III. CONCLUSION

Upon consideration of the arguments and submissions of the parties, the trial record, and the applicable law, it is hereby

ORDERED that

1. Defendant Michael Hamilton's Rule 29 motion for a judgment of acquittal is DENIED;

2. Defendant Michael Hamilton's Rule 33 motion for a new trial is DENIED;

3. Defendant Nicola Messere's Rule 29 motion for a judgment of acquittal is DENIED; and

4. Defendant Nicola Messere's Rule 33 motion for a new trial is DENIED.

IT IS SO ORDERED.

/s/ David N. Hurd
United States
District Judge

Dated: April 1, 2002
Utica, New York.